EDITOR'S NOTE

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Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

Nos. 85-83

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

EVELYN ZERMAN, PETITIONER

v.

ANDREW J. MELTON,Jr., ROBERT M. GARDINER, PETER BYRNE and DEAN WITTER REYNOLDS,INC

RESPONDENTS.

ERNEST R. ZERMAN,PETITIONER

v.

PRUDENTIAL-BACHE, LOREN P. LYON, NEW YORK STOCK EXCHANGE,INC., and IRENE SCHONZIET,

RESPONDENTS.

ERNEST R. ZERMAN,PETITIONER

v.

HARRY A. JACOBS,Jr., H.VIRGIL SHERRILL,and PRUDENTIAL-BACHE,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

EVELYN ZERMAN,ERNEST R. ZERMAN,Pro Se
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QUESTIONS PRESENTED

I. Whether 15 U.S.C. 77c(a)(2)-EXEMPTING from the Securities Act any security issued or guaranteed by (1) United States; is now ($1,500,000,000 public debt of U.S.) because of changed economic conditions, UNCONSTITUTIINAL under the 'Equal Protection' clause of 5th Amendment because 77c(a)(2), incorporated in 15 USC 77q, irrationally and unequally deprives investors in U.S.Governmant Bonds, unlike investors in corporate Bonds and Securities the 'Equal Protection of the Securities Acts of 1933 and 1934, which lack of government control resulted in Drysdale, ESM and B.B.&S. Government Securities Co.s' debacles, endangering national financial markets, including runs on Banks, 1929, should not be repeated.

II. Whether it is in conflict with the applicable decisions of Cort v. Ash, 422 U.S. 66 and Merrill Lynch v. Curran, 456

U.S. 353, not to allow investors to maintain private suits for Brokers violation of 15 U.S.C. 77q and for Broker's Margin violations under 15 U.S.C. 78g, on margin loans on U.S.Government Bonds (U.S. debt now $1,500,000,000 and rising at rate of $200,000,000 a year) and should Writ issue and not left unresolved as all three appeals put into question private suits under 15 U.S.C. 77q(a). Below is note[2], Herman & MacLean v. Huddleston, 103 S.Ct. 683 at page 685.

2. Plaintiffs also alleged violations of, *inter alia*, Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a). We have previously reserved decision on whether Section 17(a) affords a private remedy, *International Brotherhood of Teamsters v. Daniel*, 439 U.S. 551, 557, n. 9, 99 S.Ct. 790, 795, n. 9, 58 L.Ed.2d 808 (1979), and we do so once again. Plaintiffs have abandoned their Section 17(a) claim, Brief, at 4, n. 6, and the Court of Appeals did not address the existence of a separate cause of action under Section 17(a). Accordingly, there is no need for us to decide the issue.

III. Whether Florida's legislatures Police Power under 10th Amendment to establish USURY CEILING on MARGIN loans within the State, can be vitiated and circum-

vented by Stock Broker, doing business under license of Florida banking dept., have Florida citizen execute a unilateral adhesion customers agreement executed at Florida branch office at request of broker's Florida employee, that the higher USURY CEILING enacted by New York State legislature, be binding and enforceable against such Florida citizen when he purchases securities on MARGIN at broker's Florida branch with local funds.

IV. Whether there is a private cause of action under 15 U.S.C. 77q, the Anti-fraud Section of 1933 Securities Act, since private suits under 15 U.S.C. 78j(b), the Anti-fraud Section of 1934 Exchange Act, was upheld by Huddleston case, 103 S.Ct. 683, and private suits under 7 U.S.C. 6(b), Anti-fraud Section of Commodity Exchange Act was upheld by Curran, 456 U.S. 353.

V. Where Private suits for MARGIN violations under 15 U.S.C. 78g, existed prior to 1970, whether Congress by ADDING Section

7(f)-P.L.91-508 a law enforcement act-,intended to divest INNOCENT investors of Private suits for Margin violations, which conflicts with Curran and Huddleston.

VI. Where Jury Trial demanded, whether in 2nd Cir.Nos.7373 and 7535, use of arbitration award violated 1st,5th and 7th Amend., and use of Rule 38 for $2500 damage and $11,000 attorney fees awards departed from usual course of judicial proc.

[1] In *Wilko v. Swan*, 346 U. S. 427 (1953), this Court held that a predispute agreement to arbitrate claims that arise under § 12(2) of the Securities Act of 1933, 15 U. S. C. § 77*l*(2), was not enforceable. The Court pointed to language in § 14 of the Securities Act of 1933, 15 U. S. C. § 77n, which declares "void" any "stipulation" waiving compliance with any "provision" of the Securities Act, and held that an agreement to arbitrate amounted to a stipulation waiving the right to seek a judicial remedy, and was therefore void. 346 U. S., at 434–435. Years later, in *Scherk* v. *Alberto Culver Co.*, 417 U. S. 506 (1974), this Court questioned the applicability of *Wilko* to a claim arising under § 10(b) of the Securities Exchange Act of 1934, or under Rule 10b–5, because the provisions of the 1933 and 1934 Acts differ, and because, unlike § 12(2) of the 1933 Act, § 10(b) of the 1934 Act does not expressly give rise to a private cause of action. 417 U. S., at 512–513. The Court did not, however, hold that *Wilko* would not apply in the context of a § 10(b) or Rule 10b–5 claim, and *Wilko* has retained considerable vitality in the lower federal courts. Indeed, numerous District Courts and Courts of Appeals have held that the *Wilko* analysis applies to claims arising under § 10(b) of the Securities Exchange Act of 1934, 15 U. S. C. § 78j(b), and that agreements to arbitrate such claims are therefore unenforceable. See, *e. g.*, *DeLancie* v. *Birr, Wilson & Co.*, 648 F. 2d 1255, 1258–1259 (CA9 1981); *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Moore*, 590 F. 2d 823, 827–829 (CA10 1978); *Weissbuch* v. *Merrill Lynch, Pierce, Fenner & Smith*, 558 F. 2d 831, 833–835 (CA7 1977); *Sibley* v. *Tandy Corp.*, 543 F. 2d 540, 543, and n. 3 (CA5 1976), cert. denied, 434 U. S. 824 (1977); see also Brief for Petitioner 4, n. 3 (citing cases); Brief for Securities Industry Association, Inc., et al. as *Amici Curiae* 10, n. 7 (same).

Dean Witter and *amici* representing the securities industry urge us to resolve the applicability of *Wilko* to claims under § 10(b) and Rule 10b–5.

Dean Witter v. Byrd-No.83-1708(3/4/85) Note 1-

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EVELYN ZERMAN and ERNEST R. ZERMAN, Pro Se, petition for a Writ of Certiorari to review the decisions of United States Court of Appeals for the Second Circuit affirming the dismissal of three complaints and three appeals to 2nd Circuit based thereon, Numbers 83-7441, 84-7535 and 84-7373.

OPINIONS BELOW

June 1, 1984 opinion of 2nd Circuit is annexed as appendix "A". Rehearing denied 3/25/85, annexed as page 13 addition to Judge Sofaer's(S.D.N.Y.)opinion, app."B".

Jan. 31, 1985 opinion, 84-7535, not reported, involved similar issues e.g., 15USC 77c(a)(2), 77q, 78g, Margined Government U.S.Securities and arbitration award. On May 1, 1985, 2nd Circuit under Rule 38 ORDERED ATTORNEY'S FEES,$7937-NYSE. App."C".

Dec. 13, 1984, 2nd Cir. 84-7373,involving similar issues e.g., 15 USC 77c(a)(2),

77q, 78g, Margined U.S.Government securities, arbitration award, and award of $2500, Two Thousand Five Hundred Dollars to defendant Bache as damages under Rule 38. Appendix "D" is S.D.N.Y. opinion holding SEC Reg.240.15c2-2 as FRIVOLOUS.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1)

STATUTORY PROVISIONS INVOLVED

United States Constitution-Amendment V:

> 'Nor shall any person..be deprived of.. property without due process of law.. or Denied The Equal Protection of Law'

United States Constitution-Amendment VII:

> 'In suits at common law..the right of Trial By Jury shall be preserved'

United States Constitution-Amendment X:

> 'The powers not delegated to the United States by the Constitution..are reserved to the States, or to the people'

P.L.91-508(1970)-deals with law enforcement

15 U.S.C. 77c(a)(2), 77q, 78g. 9 USC 1-14.

17 CFR SEC Reg. 240.15c2-2(12/28/83) and Securities Exchange Act Release No. 15984 (7/2/79).

STATEMENT OF THE CASE

Prefatorily, there is nothing in the Constitution, laws of the U.S., Court Rules or procedures or ethical or moral reasons, prohibiting a husband from voluntarily assisting a pro se complainant, his wife, in the prosecution of her case or appeal, and such husbands assistance SHOULD NOT BE WEIGHTED against her, as was done unjusty, unfairly and prejudicially by lower Courts.

Diversity of Citizenship Jurisdiction is a fact and jury trials demanded in all cases.

All the transactions at Dean Witter Reynolds (herein 'DWR') and at Prudential-Bache (herein 'Bache') were in MARGIN GOVERNMENT SECURITIES ACCOUNTS at Brokers Hallandale, Florida branch offices, where Usury ceiling is 18%.

On 4/12/83, Judge Sofaer (S.D.N.Y.) made an erroneous decision (Appendix "B"), contrary to facts, dismissing Evelyn's claims as either legally insufficient or failing to allege facts with sufficient particular-

Judge Sofaer's bias decision (B.2~~4~~6) states:

> "Plaintiff has set forth facts which she claims establish three instances of fraud....Finally, plaintiff contends that defendants sold her the GNMA at price of $98-¼ when, in fact, the security listed at the date of sale at a price between $89 and $91. Id. ¶ 34 & Ex.H.

Below is Exhibit "H" of complaint which shows trade date April 9, AS OF MARCH 20, for this New Issue GNMA, I know of no law, SEC regulation or custom whereby you can trade a security on April 9, 1981 as of March 20, 1981 without issuing a confirmation of the sale within 5 days of 3/20/81.

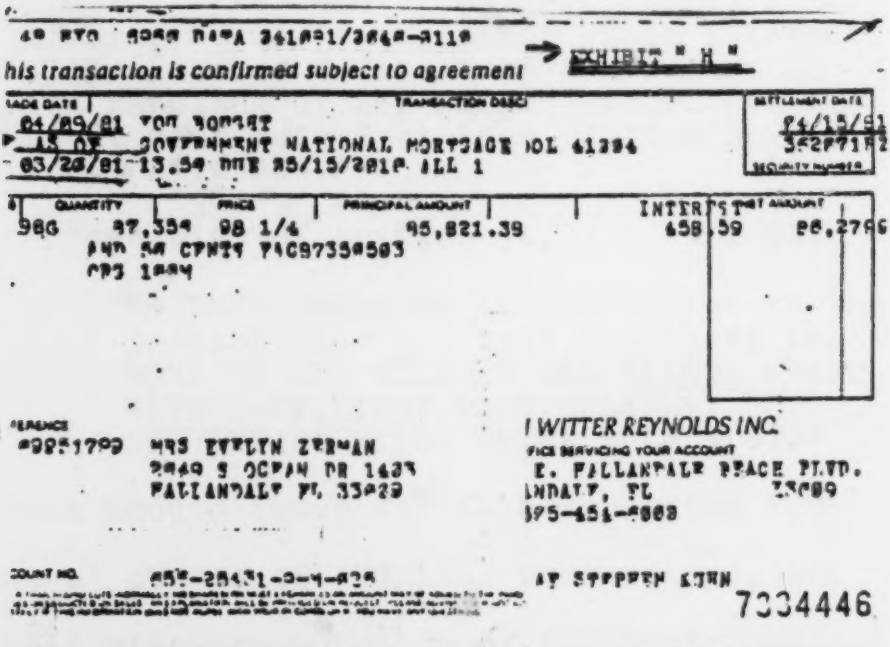

EXHIBIT " H "

his transaction is confirmed subject to agreement

TRADE DATE	TRANSACTION DESC	SETTLEMENT DATE
04/09/81 YOU BOUGHT		04/15/81
15 GX	GOVERNMENT NATIONAL MORTGAGE POL 61394	352771
03/20/81 13.50 DUE 05/15/2010 ALL 1		SECURITY NUMBER

QUANTITY	PRICE	PRINCIPAL AMOUNT	INTEREST	NET AMOUNT
986	97.359 98 1/4	95,821.39	458.59	96.279

PMT SR CPNTY 71C97359503
CPN 13.5

REFERENCE
#9851709 MRS EVELYN ZERMAN
2940 S OCEAN DR 1407
FALLANDALE FL 33029

WITTER REYNOLDS INC.
OFFICE SERVICING YOUR ACCOUNT
E. FALLANDALE BEACH BLVD.
LNDALE, FL 33009
305-454-8868

ACCOUNT NO. 85[illegible]-2841-0-4-826 AT STEPHEN KUHN

7034446

The dismissal of the complaint was un-

Judge Sofaer flagrantly departed from accepted and usual course of judicial proceedings when he allowed defendants' REBUTTAL AFFIDAVITS (R12(b)(6). Opinion(B.3):

> 'Because plaintiff has made no such showing, but has made only broad, conclusory allegations of scienter, her fraud claims are dismissed. DEFENDANTS HAVE SUCCESSFULLY REBUTTED plaintiff's final claim of fraud in an affidavit explaining the pricing procedures for GNMA's. Affidavit of Joanne La Rocca (Apr.6, 1983)'. (Zermans' note-Sofaer's judgment for defendants is 4/12/83, 6 days after Judge received affidavit.)

On 6/1/84,(A.1-4) 2nd Circuit,Affirmed:

' Appeal from a judgment in U.S.D.C. for S.D.N.Y. (Abraham D. Sofaer, Judge) dismissing Zerman's complaint which alleged violations of federal and state laws in the handling of her margin securities account with defendant Dean Witter Reynolds Inc. Affirmed.

Page 4149 of opinion (A.3) of 6/1/84:

> 'We have examined the complaint in the instant case and have concluded that NONE OF HER ALLEGATIONS ALLEGE FRAUD WITH SUFFICIENT PARTICULARITY TO SURVIVE SCRUTINY UNDER RULE 9(b).'

Writ should issue for this departure from usual course of judicial proceedings, and bald misrepresentation of the truth and misinterpretation of facts.

Judge Sofaer's opinion, page 7 (B. 3):

" Plaintiff claims that defendants violated 12(2) of Securities Act, 15 USC 77 1(2), by making fraudulent omissions in sale of securities. The securities at issue, U.S.Treasury Bonds and GNMA certificates... are exempt securities under 3(a)(2)..77c."

Sofaer's opinion, page 11 ------:

" consumers to refrain from purchasing securities at unlawful margins, 15 U. S.C.78g(f)(1976), provided further circumstantial proof that Congress had no intention to provide a private right of action against broker/dealers"

The records of the Second Circuit Court of Appeals, WHICH ZERMAN REQUESTS BE OBTAINED TO BETTER UNDERSTAND THIS PETITION, will further show in connection with their Nos. 83-7441, 84-7535 and 84-7373:

On 11-1-83, S.D.N.Y. No. 83 Civ.7980, Ernest R. Zerman, pro se, filed a securities fraud and margin violation action against Bache and New York Stock Exchange for their holding an Arbitration hearing, contrary to Wilko v Swan, on Bache's Rule 13 COUNTERCLAIM only concerning U.S. Gov't Margined Securities in Zerman's Bache account. No. 83 Civ 7980 dismissed on basis

of Res Judicata and Collateral Estoppel of Arbitration Award judgment in case No.80 Civ 3570(Weinfeld).

On 1/31/85 under 2nd Circuit No. 7535, S.D.N.Y. dismissal on basis of Res Judicata and Collateral Estoppel of default ARBITRATION AWARD was affirmed. Rehearing on No. 84-7535 was denied on 3/25/85.

On 6/4/80, Ernest R. Zerman, pro se, filed a securities fraud and margin violation action, No. 80 Civ.3570(Weinfeld), for Bache's violating the securities laws in handling of his U.S.Government Margin Securities Account. In this case, Bache filed a COUNTERCLAIM under Rule 13 which only concerned 6 U.S.Treasury Bonds. Judge Weinfeld, over Zerman's objection that Wilko v Swan applied to Bache's COUNTERCLAIM involving only 6 U.S.Treasury Bonds posted by Zerman as Margin, Ordered and approved an ARBITRATION AWARD under 9 USC9, on 3/7/83.

On 2/22/84, within less than a year of

3/7/83 Zerman filed a Motion under 60(b) by virtue of enactment effective 12/28/83 of SEC Rule 240.15c2-2 confirming Wilko v Swan doctrine. Annexed appendix "D" is Judge Weinfeld's ORDER of 3/31/84 holding SEC Rule 240.15c2-2 as frivolous.

On 12/13/84, 2nd Circuit No.84-7373, 2nd Circuit affirmed Weinfeld's dismissal and in addition, under Rule 38, levied damages-----of $2500 against Zerman for taking a frivolous appeal based on 17CFR 240.15c2-2.

All three cases, all from the Second Circuit, Nos.83-7741, 84-7535 and 84-7373 involve identical and closely related issues.

Miami Herald 3/7/85 article on issue:

ay lose millions Fr

Miami Herald 3/7/85 -Bache D.

As investigators pored over the financial records of the Fort Lauderdale securities firm closed Monday by the Securities and Exchange Commission, a Texas city postponed a bond sale; the state of Ohio issued a statement to reassure worried savings and loan customers; a congressman called for regulation of the unregulated government securities industry and city finance directors across the natiin who invested in ESM tried to discover how much their municipalities and counties could lose.

"We've never seen anything of this scale before," said Charles Harper, director of the SEC Miami office. "This could be bigger than Drysdale." That New York government securities dealer collapsed in 1982, incurring $300 million in losses.

Two New York companies, Bradford Trust Co. and Security Pacific, did not hold any securities as collateral for cities as many

REASONS FOR GRANTING WRIT-QUESTION I

Introductorily, this Court cannot ignore the changing ecomic conditions of the nation, e.g., the tremendous growth of public debt, represented by U.S.Treasuries of $1,500,000,000 and deficit growing $200,000-000 a year.

The legislative history of the 1933 and 1934 Securities Acts makes clear that Congress was primarily concerned with transactions in securities that are traded in a public market. In United Housing Foundation,Inc. v. Forman, 421 U.S.837 (1975):

> "The primary purpose of the Acts of 1933 and 1934 was to eliminate serious abuses in a largely unregulated securities market."

Lack of control over the tremendous U.S.Government securities market is because of 15 USC 77c(a)(2) and lack of control by SEC was a direct cause of Zermans' damage and the Drysdale and ESM debacles. Also, investors in U.S.Bonds are entitled to 'EQUAL PROTECTION' of Acts,

similar to investors in Corporate Bonds.

The Writ should issue, as it is a violation of Zermans' 5th Amendment rights, TO BE DENIED THE EQUAL PROTECTION OF THE SECURITIES LAWS OF 1933 and 1934 and SEC RULES, by the continued enforcement by the Courts of 15 USC 77c(a)(2), which now because of changing securities market conditions, unconstitutionally, denies Zermans the same protection provided purchasers and investors of Corporate Bonds. There is now no rational basis for such distinction between investors in U.S.Bonds and investors in Corporate Bonds.

The exemption of U.S.Government Bonds might have been a reasonable and rational classification in 1933 and 1934, and a proper exercise of Congress police power with regard to Interstate Commerce, as there was almost no fluctuation in U.S.Bonds, 1/32 of a point at the most, Now however, U.S. Bonds can change a point or more in one day. This Court should not allow 1929 to/ repeat.

The case of Plyler v Doe,457 U.S. 202,216:

> "The Equal Protection Clause directs that "all persons similarly circumstanced shall be treated alike."F. S.Royster Guano Co. v Virginia,253 US 412(1920).... In applying the Equal Protection Clause to most forms of state(here we have Congress enactment of 15 USC 77c(a)(2) action, we thus seek only the assurance that the CLASSIFICATION AT ISSUE BEARS SOME FAIR RELATIONSHIP TO A LEGITIMATE PUBLIC PURPOSE.

There is no longer a rational basis nor a legitimate public purpose to exempt the tremendous U.S.Government Bond market from control and regulation.

There is no longer a rational basis or a public purpose to be served, by not affording to U.S.Government securities investors, who are similarly circumstanced the SAME AND EQUAL protection afforded to investors of CORPORATE SECURITIES AND BONDS.

The same protection of the Securities laws and Securities & Exchange Commission Rules should be afforded to both U.S.Governments and Corporate Bonds.

REASONS FOR GRANTING WRIT QUESTIONS II, IV AND V.

The ANTI-FRAUD sections of the Securities Act of 1933, 15 USC 77q, at issue on this petition for Writ of Certiorari; the ANTI-FRAUD section of the Exchange Act of 1934, 15 USC 78j(b); and ANTI-FRAUD section of the Commodity Exchange Act, 7 USC 6(b); are all very similar in language and purpose, which is to protect the investor from fraudulent statements and acts by brokers in connection with the purchase and sale of securities.

The complaints in all three cases involve Section 17(a) of the 1933 Act, 15 USC 77q. The importance of having the law settled, as there is great CONFLICT in the Circuits, on private suits not only under 15 USC 77q but also 15 USC 78g, is beyond dispute, and this Court as FINAL ARBITER as provided for under the Constitution, has an obligation to the investors of the nation, has an obligaton to settle the questions once and for all time.

The lower court's decisions, that no private right of action exists under 77q and 78g, is in DIRECT CONFLICT with the applicable decisions in Merrill Lynch v. Curran, 456 U.S. 353, holding:

> " Although the consensus of opinion concerning the existence of a private cause of action under the CEA was neither as old nor as overwhelming as the consensus concerning 10(b),it was equally uniform and well understood." ,

and, Herman & MacLean v. Huddleston, 103 S.Ct. 683(1983) confirmed a private right of action under 15 USC 78j(b) which follows the exact language of 15 USC 77q.

There is great conflict in Circuits on question of private suits under 15 USC 77q. Kirshner v. United States, 603 F.2d, upholds private suits under 15 USC 77q.

Writ should issue pertaining to question V., because Circuit Courts contrary to Curran and Huddleston, reject such suits for 78g and 77q violations by brokers.

Since its inception, the courts have construed the SEA 1934, 15 USC 78g, as con-

tinuing to afford this remedy, which was recognized by most Circuits, i.e., Landry v. Hemphill, 473 F.2d 365(1st 1973), Pearlstein v. Scudder&German,429 F.2d 1136 (2nd Cir. 1970).

P.L.91-508 (1970) added Subsection (f) to Section 7 of SEA of 1934. Under the general description of the Bill and NEED for legislation is following statement:

" THE BILL DEALS WITH TWO MAJOR PROBLEM AREAS IN LAW ENFORCEMENT. "

As both Curran and Huddleston hold, it is the intent of Congress which determines whether private suits exist under the act.

The central inquiry in deciding whether a private remedy may be implied is congressional intent. Transamerica Mort. Advisors v. Lewis, 444 U.S. 11,23 (1979). But that inquiry differs depending on whether court considers new legislation or, as in the case of SEA 1934, legislation that Congress ADDED TO following enactment. As stated in Curran:"When Congress enacts new legisla-

"tion, the question is whether Congress intended to create a private remedy as a supplement to the expressed enforcement provisions of the statute."

".. when Congress acts in a statutory context in which an implied remedy has already been recognized by the courts...the inquiry logically is different. Congress need not have intended to create a new remedy, since one already existed; THE QUESTION IS WHETHER CONGRESS INTENDED TO PRESERVE THE PREEXISTING REMEDY."

To determine legislative intent, it is important to go to the legislative history.

Volume on Laws Legislative History-91st Congress-2nd Session 1970, Purpose p.4409:

" Part of the reason why section 7 was originally enacted in its present form may have been a concern OVER PUTTING THE SMALL INVESTOR AT RISK as to whether his broker or lender was complying with the regulation. THE AMENDMENT HAS BEEN CAREFULLY DRAWN TO AVOID THIS RESULT.

Also showing the intent of Congress to preserve the preexisting private remedy for Margin violations by brokers, is West Vol. Title 15 USCA 77a to 78i, p. 730:

" VALIDITY OF RULES AND REGULATIONS Section 301(b) of Pub.L.91-508 provided that:"The amendment made by subsection (a) of this section(adding subsec(f) of

> "this section) DOES NOT AFFECT THE CONTINUING VALIDITY OF ANY RULE OR REGULATION UNDER SECTION 7 OF THE SECURITIES EXCHANGE ACT OF 1934 in effect prior to the effective date of the amendment.

The implied right of action under 7c, MARGIN violations, stood as part of the "contemporary legal context"in which Congress acted in 1970 and 1975, when they amended the law. And the fact that the 1970 addition of 7(f) and 1975 amendments "left intact statutory provisions under which the federal courts had implied a cause of action, IS ITSELF EVIDENCE THAT CONGRESS AFFIRMATIVELY INTENDED TO PRESERVE REMEDY.

The Curran rationale, which was reaffirmed in Huddleston, applies here to 7c.

Although not going into detail here, it is evident that the private remedy under 77q and 78g, conforms with the four part test in Cort v. Ash, 422 U.S. 66. However, Zerman submits, Curran should be followed in that respect, 102 S.Ct. at 1844:

> "In view of our construction of intent of Congress..no need "trudge through all four factors..".

Writ should issue as 2nd Circuit has decided a federal question, Private Suits under 15 USC 78g, Margin violations, in CONFLICT with applicable decisions of Merrill Lynch v Curran and Herman & MacLean v Huddleston.

Since its inception, the courts have construed the 1934 Act, 15 USC 78g as affording the private remedy.

A 1970 Amendment added subsection (f), by P.L.91-508 a law enforcement statute.

The implied right of action under 7(c), 15 USC 78g(Margin) stood as part of the "contemporary legal context" in which Congress acted in 1970 and 1975 when they amended the law. And the fact that the 1970 addition of 7(f) and 1975 amendment "left intact the statutory provisions under which the federal courts had implied a cause of action, is itself evidence that Congress AFFIRMATIVELY INTENDED TO PRESERVE THAT REMEDY. Curran rationale applies to 7(c).

REASONS FOR GRANTING WRIT-QUESTION III

Lower Court invaded Zermans 10th Amendment rights under the Constitution, since Zerman as a Florida citizen is entitled to benefit of Florida's Usury laws which are applicable to securities loan transactions entered into and consumated at Dean Witter Reynolds' branch office in Hallandale, Florida where Zerman is a permanent resident.

To hold otherwise is a departure from Erie R. Co. v. Tompkins, 304 U.S. 64,78:

> "Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the STATE."

Section 175 of 16 C.J.S., page 901:

Cf. East N.Y.Saving BK. v Hahn, 66 S.Ct. 69:

> "The police power of the state extends to all great public needs,... and the protection of all property within the state and the EXECUTION OF ALL CONTRACTS AFFECTING SUCH MATTERS.

REASONS FOR GRANTING WRIT-QUESTION VI.

Prefatorily, it was manifest injustice in cases Nos. 7535 and 7373, under Rule 38 to award $11,000 Attorney Fees and $2500 in damages, as appeals were not FRIVOLOUS.

The Arbitration Act, 9 USC 1-14, in so far as it forces a person to arbitrate a dispute, involuntarily, is an unconstitutional abrogation of Zermans' rights under 7th and 5th Amendments, as well as 'Access to the Courts' guaranteed by 1st Amendment. Also violates separation of powers between the judicial and legislative branches of the government.

Expediency of relieving the federal case load, has no place in the administration of Equal Justice to all, which is a fundamental right guaranteed by our system of Government.

The case holding of Dean Witter Reynolds v. Byrd, No.83-1708 (3-4-85) cannot be applied to a forcing of Arbitration, under III:

> "By its terms, the Act leaves no place for the exercise of discretion by a district court, but instead mandates that district court shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed. PP.3-4.

Congress does not have the constitutional power to mandate a court not to exercise discretion.

CONCLUSION: For all the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Evelyn Zerman

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Hallandale, Florida 33009
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CERTIFICATION OF SERVICE

I, Ernest R. Zerman, hereby Certify that on 6/21/85, I deposited copies of the foregoing Petition, in U.S.Mail Box in Hallandale, Florida, with 1st class postage prepaid and properly addressed;

To: John Peloso,Esq., atty for Dean Witter Reynolds, Two World Trade Center, New York, New York 10048;

To: Marvin Schwartz,Esq., atty for Prudential-Bache, 125 Broad Street, New York, New York 10004; and

To: Russell E. Brooks,Esq., atty for New York Stock Exchange, Inc., One Chase Manhattan Plaza, New York, New York 10005

Ernest R. Zerman

Ernest R. Zerman

(2)

Supreme Court, U.S.
FILED
SEP 27 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-83

IN THE

Supreme Court of the United States

October Term, 1985

EVELYN ZERMAN,

Petitioner,

v.

ANDREW J. MELTON, Jr., ROBERT M. GARDINER, PETER BYRNE and DEAN WITTER REYNOLDS, INC.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS ANDREW J. MELTON, Jr., ROBERT M. GARDINER, PETER BYRNE & DEAN WITTER REYNOLDS, INC. IN OPPOSITION

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18 pp

QUESTIONS PRESENTED

1. Whether Petitioner's failure to present good or sufficient reasons for granting of a writ of certiorari warrants denial of the petition.

2. Whether the frivolous nature of this petition supports an award of appropriate damages.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-83

EVELYN ZERMAN,

PETITIONER

v.

ANDREW J. MELTON, JR., ROBERT M. GARDINER, PETER BYRNE and DEAN WITTER REYNOLDS, INC.,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS ANDREW J. MELTON, JR., ROBERT M. GARDINER, PETER BYRNE AND DEAN WITTER REYNOLDS INC. IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. A.5-A.6) is unreported. A prior

opinion of the court of appeals (Pet. App.A) is reported at 735 F.2d 751. The order of the district court (Pet. App. B) is unreported.

JURISDICTION

The order of the court of appeals was entered on March 25, 1985, and the petition for a writ of certiorari was filed on June 24, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

In October 1982, Petitioner Evelyn Zerman filed suit against Respondents for alleged wrongs committed by them in connection with her securities account at Dean Witter Reynolds Inc. ("Dean Witter").[1] Respondents' subsequent motion to dismiss was granted by

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1 The two other cases to which the petition relates do not involve Respondents but will be addressed infra, in connection with Respondents' request for an award of damages.

the district court (Pet. App. B) and the dismissal affirmed by the court of appeals (Pet. App. A-A.4). A petition for rehearing was denied by the court of appeals (Pet. App. A.5-A.6).

Petitioner's claims against Respondents arose primarily out of her purchase of a Government National Mortgage Association ("GNMA") Certificate and United States Treasury Bonds (Pet. App. B.3). Her numerous claims, made under a variety of federal and state laws, were primarily dismissed for failure to satisfy Rule 9(b) of the Federal Rules of Civil Procedure, Fed. R. Civ. P. 9(b) (Pet. App. A.2-A.4). The district court dismissed the claim made under section 12(2) of the Securities Act of 1933 (the "Securities Act"), 15 U.S.C. §771(2) because, for that purpose as well as others, GNMA Certificates and U.S. Treasury Bonds are exempt securities

and thus not susceptible to a section 12(2) claim (Id.). Neither the correctness of the section 12(2) decision, nor the validity of the statute pursuant to which it was made, ever was addressed in the court of appeals (Pet. App. A-A.4).

Because of the "repetitive actions alleging similar fraud by various brokerage houses" which she and her husband had filed over a period of time long enough to have instructed them in the "complexities of their investment transactions" and their "peculiar vulnerability to fraudulent conduct," the court of appeals denied Mrs. Zerman the "usual opportunity" to amend her complaint before dismissal under Fed.R.Civ.P. 9(b) (Pet. App. A-3, A-4).

ARGUMENT

1. The considerations governing the granting of a writ of certiorari are contained in Rule 17 of this Court, and make clear that review will be granted "only when there are special and important reasons therefor." Reasons given by the Rule, not an exclusive listing, include a conflict among courts of appeals and an egregious departure by such a court from "the accepted and usual course of judicial proceedings." Review may also be granted when a court of appeals has decided "an important question of federal law" which either has not been but should be determined by this Court, or which conflicts with a decision of this Court.

The petition meets none of these requirements. Moreover, to the extent that the petition raises an issue regarding the availability of a private cause of action

under §17(a) of the Securities Act, 15 U.S.C. §77q, not only was it not raised in the court of appeals (Pet. App. A-A.4), but it is largely irrelevant to Petitioner's case. Mrs. Zerman's fraud claims were dismissed because they were not pleaded with the particularity required by Fed. R. Civ. P. 9(b) (Pet. App. B - B.4). Since any claim under §17(a) is a fraud claim also subject to the requirements of Fed. R. Civ. P. 9(b), the availability of such a remedy would have been and is of no matter to her. The court of appeals agreed with the district court that none of Mrs. Zerman's fraud claims were pleaded with sufficient particularity, and denied to her the opportunity to amend prior to dismissal (Pat. App. A.3-A.4).

As to the issue raised by Petitioner concerning the exemption of securities issued or guaranteed by the United States from

various provisions of the Securities Act, that issue was not raised by the petitioner in either the district court or the court of appeals (Pet. App. B - B.4, A - A.4) and should thus not be reviewed in this Court. Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388, 397 (1970). Petitioner's attempt to use the current publicity this question has received as an afterthought for obtaining review by this Court should not be countenanced. Moreover, the exemption only prevented Mrs. Zerman from asserting a claim pursuant to §12(2) of the Securities Act. Her claims asserted pursuant to other federal as well as state laws, regulating securities and otherwise, were fully considered below. She was thus in no manner prevented from recovering for perceived wrongs. The petition should be denied.

2. In addition to denial of the petition, damages should be awarded to Respondents based upon the frivolous nature of this petition.

The case involving Respondents is but one of three lawsuits, all filed in the United States District Court for the Southern District of New York against brokerage houses, which Petitioners would have this Court review. The two matters not involving Respondents concerned Petitioner Ernest Zerman's securities account at Prudential-Bache Securities, Inc. ("Prudential"). The conduct of their litigation may be described as follows.

Petitioners are husband and wife, the former an attorney (Pet. App. A.2, D.2). In June of 1980 Mr. Zerman commenced an action against Prudential and was ordered to arbitrate his claims after Prudential moved to compel arbitration. (Pet. App. D.2-D.3). The

order to arbitrate was affirmed by the court of appeals (Id.). Thereafter, Ernest Zerman filed a series of motions to resist arbitration and, after twenty months, was enjoined by the district court from filing any further motions until arbitration was had (Id.). Mr. Zerman failed to appear at the arbitration hearing, an award was rendered against him and, on March 8, 1983, the award was confirmed by the district court and a judgment entered thereupon (Id.).

Over a year later Mr. Zerman moved before the district court to set aside that final judgment (Id.). That motion was denied as patently frivolous and, on December 13, 1984, that denial was affirmed by the court of appeals (Pet. App. D.1, D.3-D.4, D.6, D.9-D.10). Zerman was assessed double costs plus $2,500 damages for taking a frivolous appeal (Pet. App. D.5-D.6). Two prior

petitions for writs of certiorari filed by Zerman in that matter had been denied by this Court on October 3 and November 7, 1983. Zerman v. Jacobs, 104 S.Ct. 183 (1983); Zerman v. Jacobs, 104 S.Ct. 399 (1983). His motion to direct the Clerk of this Court to file his petition had been denied on October 2, 1982. Zerman v. Jacobs, 459 U.S. 811 (1982).

In early November, 1983, suspiciously close in time to when Mr. Zerman's second petition had been denied by this Court, his second litigation against Prudential was filed in the United States District Court for the Southern District of New York (Pet. 6). The New York Stock Exchange, under whose auspices Prudential had conducted its court-ordered arbitration against Mr. Zerman, was included as a defendant (Id.). By Order dated May 7, 1984, the district court granted the defendants' motions to dismiss (Id. at 6-7). The

court of appeals affirmed by decision dated January 31, 1985 (Id. at 7) and assessed attorneys' fees of all appellees against Zerman (Pet. App. C.2,C.4). Claims for attorneys' fees of $7,937.50 and $4,000 were approved accordingly in favor of The New York Stock Exchange, and Prudential, Loren P. Lyon and Irene Schonzeit, respectively (Id.). A petition for rehearing was denied by the court of appeals on March 20, 1985 (Pet. App. C.5,C.6).

It was on October 22, 1980, shortly after her husband filed suit against Prudential, that Evelyn Zerman opened her account with Respondent Dean Witter and, two years later, filed suit against it as well as the three remaining Respondents (Pet. App. B, B.2).

Thus, the court of appeals has assessed double costs, damages of $2,500. and

a total of $11,937.50 in attorneys' fees against Petitioner Ernest Zerman for the filing of frivolous appeals. This occurred because Zerman failed to heed the warning given to him in his wife's case by that Court, in affirming the dismissal obtained by Respondents, that "repetitive and baseless claims brought to recoup investment losses may lead to such an award" (Pet. App. A.4; D.6, n. 2).

Rule 49 of the Rules of this Court provides in pertinent part that:

> 2. When an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages.

It is respectfully submitted that the Zermans' petition supports an award of damages against them and in favor of Respondents. This Court is requested to do so.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied, with an award of attorneys' fees to Respondents.

September 26, 1985

Respectfully submitted,

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Office-Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

(3)

Nos. 85-83

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

EVELYN ZERMAN, PETITIONER

v.

ANDREW J. MELTON,Jr., ROBERT M. GARDINER, PETER BYRNE and DEAN WITTER REYNOLDS,INC

RESPONDENTS.

ERNEST R. ZERMAN,PETITIONER

v.

PRUDENTIAL-BACHE, LOREN P. LYON, NEW YORK STOCK EXCHANGE,INC., and IRENE SCHONZIET,

RESPONDENTS.

ERNEST R. ZERMAN,PETITIONER

v.

HARRY A. JACOBS,Jr., H.VIRGIL SHERRILL,and PRUDENTIAL-BACHE,

RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

***** APPENDIX *****

EVELYN ZERMAN,ERNEST R. ZERMAN,Pro Se
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28pp

alleged violations of federal and state laws in the handling of her margin securities account with defendant Dean Witter Reynolds, Inc.

Affirmed.

Evelyn Zerman, Hallandale, Florida, *Plaintiff-Appellant pro se.*

JOHN F. X. PELOSO, New York, New York (Dorothy E. Hughes, Sage Gray Todd & Sims, New York, New York), *for Defendants-Appellees.*

Per Curiam:

This is an appeal from a judgment entered in the Southern District of New York dismissing Mrs. Zerman's complaint. In it, she alleged violations of a panoply of federal and state laws in the handling of her margin securities account by defendant, Dean Witter Reynolds, Inc. and three of its employees also named as defendants.

This complaint is merely the latest in a series of actions brought either by the plaintiff or by her husband, Ernest Zerman, against different brokerage houses. *See Zerman v. Jacobs*, 510 F. Supp. 132 (S.D.N.Y.), *aff'd mem.* 672 F.2d 901 (2d Cir. 1981); *Zerman v. Cowen*, 82 Civ. 1232 (S.D.N.Y. March 3, 1983); *Zerman v. Ball*, No. 83-7213 (2d Cir., May 15, 1984). The complaints in these cases allege disturbingly similar circumstances of fraudulent conduct by different brokers occurring over the course of

four years and having to do with purchases of Government National Mortgage Association certificates and other bonds on margin. Viewed in their totality, the allegations of the four complaints indicate that Mr. or Mrs. Zerman purchased bonds on margin, filed a complaint alleging securities fraud, then purchased more bonds through different brokers followed by other complaints. In *Ball*, for example, Mrs. Zerman alleged a failure of the defendants there to inform her of the nature of a margin account at a time just after her husband had filed a complaint in *Jacobs* indicating his unfortunate experience with margin accounts. The complaint in the instant case is remarkably similar to the complaint in *Ball*, again alleging a failure to take into account Mrs. Zerman's status as a housewife innocent of investment complexities. Yet the fraudulent activities alleged in the instant case occurred at a time when the fraudulent nature of the activiti alleged in *Ball* must have become obvious to Mrs. Zerman through the monthly statements she was receiving.

In *Ball*, we reversed as to one allegation of fraudulent misrepresentation which was facially sufficient to survive a motion to dismiss. We noted that her other claims of fraud were insufficient under Fed. R. Civ. P. 9(b) to state a valid claim for relief. We have examined the complaint in the instant case and have concluded that none of her allegations allege fraud with sufficient particularity to survive scrutiny under Rule 9(b). In light of the repetitive actions alleging similar fraud by different brokerage houses over periods of time sufficiently lengthy to have apprised Mr. and Mrs. Zerman of the complexities of their investment transactions and to have sensitized them to their peculiar vulnerability to fraudulent conduct, we

perceive no reason to accord her the usual opportunity to amend a complaint before dismissal under Rule 9(b).

Appellees have moved for double costs and attorney's fees for this appeal. Since it is the totality of the litigation brought by the Zermans which causes skepticism about their claims, and the evidentiary record before us on this single appeal, given the pendency of *Ball*, falls short of demonstrating the bad faith necessary to award such fees, *Nemeroff v. Abelson*, 704 F.2d 652, 659-60 (2d Cir. 1983), we deny the motion. However, repetitive and baseless claims brought to recoup investment losses may lead to such an award.

Since our holding is that the complaint should be dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim for relief, we need not reach the procedural issues raised by appellant regarding summary judgment.

Affirmed.

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APPENDIX A.5

ORDER DENYING REHEARING- No. 83-7441

(FILED MAR 25 1985)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 25th day of March, one thousand nine hundred and eighty-five.

Present: HON. RALPH K. WINTER,
HON. GEORGE C. PRATT,
HON. J. EDWARD LUMBARD
Circuit Judges,

EVELYN ZERMAN,

Plaintiff-Appellant,

v.

No.83-7441

ANDREW J. MELTON, et al.,

Defendants-Appellees.

APPENDIX A.6

A petition for a rehearing having been filed herein by plaintiff-appellant, Evelyn Zerman, pro-se,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Elaine B. Goldsmith

Elaine B. Goldsmith,

Clerk

APPENDIX B.1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - - - - - - - - - - - - x

EVELYN ZERMAN,

Plaintiff,

-against-

ANDREW J. MELTON,JR.,
ROBERT M. GARDINER,
PETER BYRNE,
DEAN WITTER REYNOLDS,INC.,

Defendants.

MEMORANDUM AND ORDER

82 Civ. 6846(ADS)

(Filed- April 12, 1983)

- - - - - - - - - - - - - - - - x

ABRAHAM D. SOFAER,D.J.:

Plaintiff, Evelyn Zerman, brings this action pro se alleging that defendants violated a panoply of federal and state laws in handling her margin securities account held with defendant Dean Witter Reynolds, Inc., ("Dean Witter"). . . . .

. . . . . .

APPENDIX B.2

PART OF PAGE 6-SOFAER'S OPINION

defendants sold her the GNMA at price $98¼ when, in fact, the security listed at the date of sale at a price between $89 and $91. Id para.34 & Ex.H.

. . . . . .

Plaintiff's second factual recital, which merely indicates errors in book-keeping, also fails to state a claim. See Zerman v. Jacobs, 510 F. Supp. at 134. Absent an adequate showing of scienter - facts indicating an intent to defraud, a reckless disregard for the truth or a knowing use of a device, scheme, or artifice to defraud - plaintiff's claims must fail.

APPENDIX B.3

PART OF PAGE 7-SOFAER'S OPINION

....Defendants have successfully rebutted plaintiff's final clai m of fraud in an affidavit explaining the pricing procedures for GNMA'S. Affidavit of Joanne La Rocca (Apr. 6,1983). .....

2. Claim Under Section 12(2)

Plaintiff claims that defendant violated S12(2) of the Securities Act,15USC 771(2)(1976), by making fraudulent omissions in the sale of securities. The securities at issue, United States Treasury Bonds and GNMA certificates, are "securities issued or guaranteed by the United States" and therefore are exempt securities under 3(a)(2) of the Securities Act, 15 U.S.C.1723c (1976); Davidson v. Dean Witter Reynolds,Inc., 478 F.Supp.494,495 (D.ColO.1979). Plaintiff's claim is dismissed with prejudice. .....

APPENDIX C.1

ORDER-$7,937 Attorney Fees-No.84-7535

(Filed MAY 1 1985)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of May, one thousand nine hundred and eighty-five.

ERNEST R. ZERMAN,
Plaintiff-Appellant,

-against-

84-7535

PRUDENTIAL-BACHE SECURITIES,
LOREN P. LYON,
THE NEW YORK STOCK EXCHANGE INC,
and IRENE SCHONZEIT.

Defendants-Appellees.

Appellee, the New York Stock Exchange having submitted a claim for attorney's fees in the amount of seven thousand nine

hundred thirty-seven dollars and fifty cents ($7937.50) in accordance with this court's decision of January 31, 1985 which assessed appellant Zerman "reasonable attorney's fees of all appellees" and appellant having filed no objection to said claim,

UPON CONSIDERATION THEREOF, it is

ORDERED that an attorney's fee in the amount of seven-thousand nine hundred thirty seven dollars and fifty cents ($7,937.50) be assessed against appellant Ernest R. Zerman in favor of appellee, The New York Stock Exchange, Inc.

ELAINE B. GOLDSMITH, Clerk

by Arthur Heller
Arthur Heller, Deputy
Clerk

APPENDIX C.3

ORDER-$4000 Attorney Fees-No.84-7535

(FILED MAY 1 1985)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the first day of May, one thousand nine hundred and eighty-five.

ERNEST R. ZERMAN, Plaintiff-Appellant, -against- PRUDENTIAL-BACHE SECURITIES LOREN P. LYON, THE NEW YORK STOCK EXCHANGE, INC., and IRENE SCHONZEIT, Defendants-Appellees.	Docket No. 84-7535

Prudential-Bache Securities, Loren P. Lyon appellees, and Irene Schonzeit having submitted a claim for attorneys fees

in the amount of four thousand dollars ($4000.00) in accordance with this court's decision of January 31, 1985 which assessed appellant Zerman "reasonable attorney's fees of all appellees" and appellant having filed no objection tosaid claim,

UPON CONSIDERATION THEREOF, it is

ORDERED that an attorney's fee in the amount of four thousand dollars ($4000.00) be assessed against appellant Ernest R. Zerman in favor of appellees Prudential-Bache Securities, Loren P. Lyon and Irene Schonzeit.

ELAINE B. GOLDSMITH, Clerk

by Arthur Heller

Arthur Heller, Deputy Clerk

APPENDIX C.5

ORDER DENYING REHEARING-No.84-7535

(FILED MAR 20 1985)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 20th day of March, one thousand nine hundred and eighty-five.

- - - - - - - - - - - - - - - -

ERNEST R. ZERMAN,

Plaintiff-Appellant,

v.

BACHE HALSEY STUART SHIELDS, INC., LOREN P. LYONS, NEW YORK STOCK EXCHANGE, INC and IRENE SCHONZEIT,

Defendants-Appellees.

No.84-7535

- - - - - - - - - - - - - - - -

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by plain-

tiff-appellant, Ernest R. Berman, pro-se

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith
Elaine B. Goldsmith
Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT -APPENDIX D.1

No. 287 — August Term, 1984

(Argued: Nov. 19, 1984 Decided: Dec. 13, 1984)

Docket No. 84-7373

ERNEST R. ZERMAN,

Plaintiff-Appellant,

—against—

HARRY A. JACOBS, JR., individually,
H. VIRGIL SHERRILL, individually, and
BACHE HALSEY STUART SHIELDS INC.,

Defendants-Appellees.

Before:

LUMBARD, MANSFIELD and CARDAMONE, *Circuit Judges.*

Plaintiff-appellant, Ernest R. Zerman, appeals from an order of the United States District Court for the Southern District of New York (Weinfeld, *J.*) that denied his Fed. R. Civ. P. 60(b) motion to set aside an order confirming an arbitration award in favor of defendants, Bache Halsey Stuart Shields Inc. and two of its officers.

Affirmed.

ERNEST R. ZERMAN, *Pro se*, Hallandale, Florida for *Plaintiff-Appellant.*

D.2 - MICHAEL STRAUSS, New York, New York (Jeh Charles Johnson, Sullivan & Cromwell, New York, New York, of counsel) *for Defendants-Appellees.*

PER CURIAM:

When a party, after engaging in a course of harassing litigation, appeals the denial of a Rule 60(b) motion on patently frivolous grounds, double costs plus attorneys fees should be assessed under Federal Rule of Appellate Procedure 38. Ernest R. Zerman, a lawyer, appeals from an order of the United States District Court for the Southern District of New York (Edward Weinfeld, *J.*) that denied his Rule 60(b) motion to set aside that court's order, which confirmed an arbitration award and entered judgment in favor of defendants Bache Halsey Stuart Shields Inc., the name of which has been changed to Prudential Bache Securities Inc. ("Bache"), and two of its officers. We affirm.

I

Plaintiff Zerman originally brought this action in June 1980 alleging claims under the Securities and Exchange Act of 1934, rules of the National Association of Securities Dealers, and state and common law in connection with a margin securities account he maintained with defendant Bache. Bache counterclaimed. The substance of plaintiff's claims were discussed in detail in an opinion by the district court. *See Zerman* v. *Jacobs*, 510 F. Supp. 132 (S.D.N.Y.), *aff'd*, 672 F.2d 901 (2d Cir. 1981). In that opinion the district court stated that "plaintiff, seizing upon a mere computer error, is attempting to convert it into a claim of fraud under the

federal securities laws." *Zerman*, 510 F. Supp. at 184. Concluding that Zerman "failed to state a proper claim under any provision of the federal securities laws," *id.* at 135, the district court granted Bache's motion to compel arbitration on the state and common law claims based upon plaintiff's agreement to arbitrate all claims arising out of his brokerage account. We affirmed the district court's decision by summary order. *Zerman*, 672 F.2d 901.

Zerman thereupon proceeded to file a series of motions in an effort to resist arbitration. After he had engaged in twenty months of delaying tactics, the district judge enjoined him from filing further motions until his claims were resolved in arbitration. Again plaintiff took an appeal that was unsuccessful. *Zerman* v. *Jacobs*, No. 80 Civ. 3570 (S.D.N.Y. Nov. 12, 1982), *appeal dismissed*, No. 82-7915 (2d Cir. Apr. 29, 1983). In January 1984, when plaintiff failed to appear at the scheduled arbitration, the arbitrators awarded Bache $47,234.57 with interest on its counterclaim. On March 8, 1983 the district court confirmed the arbitration award and entered judgment against plaintiff.

Over a year later, in April 1984, plaintiff moved before the district court under Rule 60(b) to set aside the final judgment. Zerman argued that a newly promulgated SEC Rule, 17 C.F.R. § 240.15c2-2 (1984), constituted "newly discovered evidence" under Rule 60(b)(2), and that legal arguments made by defendant's counsel as to the applicability of the Supreme Court's decision in *Wilko* v. *Swan*, 346 U.S. 427 (1953), constituted "misrepresentation, or other misconduct of an adverse party" under Rule 60(b)(3). The district court, its patience tried by plaintiff's "course of harassing litigation," denied

D.4 the motion. Judge Weinfeld's conclusion was concise: "The grounds asserted for vacatur of the judgment are so patently frivolous as to merit no discussion. The application is denied." *Zerman* v. *Jacobs*, No. 80 Civ. 3570 (S.D.N.Y. Mar. 31, 1984). Undaunted by the district court's message, plaintiff appeals again.

II

SEC Rule 15c2-2, promulgated by the Securities and Exchange Commission, 17 C.F.R. § 240.15c2-2,[1] does not

---

[1] § 240.15c2-2 Disclosure regarding recourse to the courts notwithstanding arbitration clauses in broker-dealer customer agreements.

(a) It shall be a fraudulent, manipulative or deceptive act or practice for a broker or dealer to enter into an agreement with any public customer which purports to bind the customer to the arbitration of future disputes between them arising under the Federal securities laws, or to have in effect such an agreement, pursuant to which it effects transactions with or for a customer.

(b) Notwithstanding paragraph (a) of this section, until December 31, 1984 a broker or dealer may use existing supplies of customer agreement forms if all such agreements entered into with public customers after December 28, 1983 are accompanied by the separate written disclosure:

Although you have signed a customer agreement form with FIRM NAME that states that you are required to arbitrate any future dispute or controversy that may arise between us, you are not required to arbitrate any dispute or controversy that arises under the federal securities laws but instead can resolve any such dispute or controversy through litigation in the courts.

(c) A broker or dealer shall not be in violation of paragraph (a) of this section with respect to any agreement entered into with a public customer prior to December 28, 1983 if:

(1) Any such public customer for whom the broker or dealer has after July 1, 1983 (i) carried a free credit balance, or (ii) held securities for safekeeping or as collateral, or (iii) effected a securities transaction is sent, no later than December 31, 1984, the disclosure prescribed in paragraph (b) of this section; or

(2) Any other public customer is sent upon the completion of his next transaction pursuant to such agreement, the disclosure prescribed in paragraph (b) of this section.

D.5 constitute "newly discovered evidence" that justifies granting relief from the judgment within the meaning of Rule 60(b)(2) of the Federal Rules of Civil Procedure. Nor does this Rule issued in 1983 retroactively invalidate the 1977 agreement between Zerman and Bache. *See* SEC Rule 15c2-2(c).

SEC Rule 15c2-2, in any event, is not applicable here. In *Wilko* v. *Swan* the Supreme Court held that an agreement between a broker and customer to arbitrate federal securities law claims is unenforceable. The district court concluded, and we agreed, that Zerman could not avoid the arbitration provision of his customer agreement under *Wilko* v. *Swan* because he had failed to state a proper claim under any provision of the federal securities laws. *Zerman* v. *Jacobs*, 510 F. Supp. at 134-35. SEC Rule 15c2-2, restating the rule of *Wilko* v. *Swan*, only addresses the situation involving disputes between broker and customer "arising under the Federal securities law." SEC Rule 15c2-2(a). It therefore cannot serve as a basis for setting aside this judgment under Rule 60(b)(2). In light of the district court's holding that Zerman's complaint fails to state a claim under the federal securities laws, and our affirmance of that order, defense counsel's argument that *Wilko* v. *Swan* has no application to this case obviously does not constitute "misrepresentation, or other misconduct of an adverse party" within the meaning of Rule 60(b)(3). Thus, there is no basis for setting aside the judgment.

This appeal is frivolous. Plaintiff, having kept this lawsuit going for over four years, is making his third trip to this Court. He continues to relitigate the same issue that the district court decided and we affirmed in

D.6-1981.[1] Plaintiff has cast his line one time too many. As a consequence, Zerman is assessed double costs in this Court plus $2,500 damages for taking a frivolous appeal, payable to Prudential Bache Securities Inc. within fourteen days of the issuance of this order. See Fed. R. App. P. 38.

---

[1] Plaintiff has brought other actions on issues apparently similar to the present case. *See Zerman v. Bache Halsey Stuart Shields Inc.*, No. 83 Civ. 7980 (S.D.N.Y. May 7, 1984); *Zerman v. Cowen*, No. 82 Civ. 1232 (S.D.N.Y. Feb. 9, 1983).

We note that plaintiff's wife has brought suit against different brokerage houses also alleging circumstances of fraudulent conduct similar to the present case. *See Zerman v. Melton*, 735 F.2d 751 (2d Cir. 1984); *Zerman v. Ball*, 735 F.2d 15 (2d Cir. 1984). Although in *Melton* we denied appellee's motion for double costs and attorney's fees, we warned that "repetitive and baseless claims brought to recoup investment losses may lead to such an award." *Zerman v. Melton*, 735 F.2d at 752.

APPENDIX D.7

ORDER DENYING REHEARING- NO. 84-7373

(Filed- Mar 6, 1985)

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

Docket No. 84-7373

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 6th day of March, one thousand none hundred and eighty-five.

- -

ERNEST R. ZERMAN,

Plaintiff-Appellant,

-against-

HARRY A. JACOBS,Jr., individually, H. VIRGIL SHERRILL, individually, and BACHE HALSEY STUART SHIELDS INC.,

Defendants-Appellees.

- -

A petition for rehearing contained a suggestion that the action be reheard in banc having been filed herein by Attorney

Appendix D.8

Pro se, Ernest R. Zerman.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B.Goldsmith
Elaine B. Goldsmith
Clerk

APPENDIX D.9

MEMO ENDORSED OPINION S.D.N.Y.-80 Civ.3570

(FILED APR 2 1984)

MEMO ENDORSED

ZERMAN v. JACOBS
80 Civ. 3570 (EW)

Plaintiff, an attorney who clearly has embarked upon a course of harassing litigation, moves pursuant to Fed.R.Civ.P.60(b) to vacate the Court's March 7,1983 judgment confirming an arbitration award entered against plaintiff after the Court granted defendants' motion to compel arbitration of plaintiff's claims. (Zerman's note-plaintiff's claims had already been dismissed). Zerman v. Jacobs, 510 F.Supp.132 (S.D.N.Y.),aff's,672 F.2d901(2d 1981).

The grounds asserted for vacatur of the judgment are so patently frivolous as to merit no discussion. The application is denied.

Plaintiff's attention is directed to Fed.R.Civ.P. 11,as amended, and to the

inherent equitable power of the Court to assess fees against a party who has "acted in bad faith, vexatiously, wantonly, or for appressive reasons." Tedeschi v. Smith Barney, Harris Upham & Co., 81 Civ. 6938, slip op. at 3 (S.D.N.Y. January 17, 1984), quoting Alyeska Pipeline Co., v. Wilderness Society, 421 U.S. 240,258 - 59 (1975).

So ordered.

Dated: New York, New York
March 31, 1984

Edward Weinfeld

United States District Judge

APPENDIX- E

UNITED STATES CODE-CONGRESSIONAL AND ADMINISTRATIVE NEWS-91st CONGRESS-2nd SESSION-VOLUME 2-WEST PUBLISHING CO.

BANKS-RECORDS, TRANSACTIONS P.L.91-508

NEED FOR THE LEGISLATION

GENERAL DESCRIPTION OF THE BILL

The bill deals with two major problem areas in law enforcement. .....

page 4395

.....Part of the reason why section 7 was originally enacted in its present form may have been a concern over putting the small investor at risk as to whether his broker or lender was complying with the regulations. THE AMENDMENT HAS BEEN CAREFULLY DRAWN TO AVOID THIS RESULT.

page 4409

301.Amendment of section 7 of SEA of 1934

(b) Amendment made by (a) does not affect cntinuing validity of ..reg. under sec. 7

The Miami Herald

Insecure Industry

THE time clearly is now for Congress to put some controls on the peddlers of Government debt and for the Florida Legislature to insist that local governments employ more safeguards when investing public money. The possible loss of more than $300 million through ESM, a Fort Lauderdale securities firm, was perhaps a scandal waiting to happen in an unfettered industry. It had been foreshadowed by two other failures of similar firms.

Some 16 cities, including Pompano Beach and Tamarac, could lose $104 million invested in repurchase agreements with ESM. American Savings & Loan of Miami and six other savings institutions may have losses of up to $200 million. ESM's dealings with an Ohio savings and loan led to the closing of state-chartered institutions there.

In 1982, Drysdale Government Securities collapsed. Its president was sentenced to eight years in prison for fraud and ordered to repay $300 million. Last year, Lion Capital Group folded, owing local-government investors $40 million, including $4 million to the Duval County (Jacksonville) School Board.

quate capital reserves. Whether those measures are sufficient should be determined by thorough hearings by Congress. Dealers in securities issued by the private sector have been regulated by the Securities and Exchange Commission for five decades. Considering the size and complexity of the Government-securities scandals, similar controls well may be merited.